

**AMENDED STATEMENT OF JUSTIFICATION  
PROPERTY OF MEHRMAH PAYANDEH  
WAIVER REQUESTS  
(Subdivision Ordinance §2-39.C)  
and  
(Zoning Ordinance §7-302.1.B)**

**May 1, 2007**

**INTRODUCTION:** Mrs. Mehrmah Payandeh (the “Applicant”) is the owner of 587.50 acres known as Apple Manor, in the Marshall Magisterial District. The Applicant has previously subdivided 100 acres located adjacent to Apple Manor Road into one (1) lot and is now requesting approval of certain waivers of the requirements for a connection to a public street for access roads, in order to subdivide the remaining 487.50 acres to create eight (8) lots, further identified as PINs 6032-17-7831-000, 6022-94-5679-000, 6022-86-6327-000, and 6022-98-3780-000 (the “Property”). All but three of these proposed lots are accessed by an existing road, and no waiver is required or requested with respect to access to the existing 100 acre parcel (GPIN 6022-98-3780-000, or for proposed lots 1, 5, 6, 7, or 8, each of which is currently served either by existing Apple Manor Road, existing Orchard Hill Lane, or existing Audubon Trail<sup>1</sup>, as depicted on the “Waiver Plat on the Property of Mehrmah Payandeh, Marshall Magisterial District, Fauquier County, Virginia, \,” prepared by Carson Ashley and Assocs. .

The Property is located east of Route 688 (Leeds Manor Road) approximately 3.3 miles south of its intersection with Route 17 (Winchester Road). The Property is zoned Rural Conservation.

**PROPOSAL:** The Applicant requests approval of certain waivers detailed below for the purpose of providing suitable access to the subdivided large lot parcels. Waivers are requested from the requirement of § 7-302.1.B of the Fauquier County Zoning Ordinance and § 2-39.3.C.3 of the Fauquier County Subdivision Ordinance, in order to permit Mrs. Payandeh to effect an otherwise lawful large lot subdivision in accordance with § 2-39.C of the Subdivision Ordinance and § 2-310 of the Fauquier County Zoning Ordinance. This waiver is accompanied by a

---

<sup>1</sup> Of these roads, only a portion of Apple Manor and a portion of Audubon Trail exist in fact, as improved Type III roads. The remaining extent of those roads exists only in that they were platted with the original subdivision of Apple Manor, but they are not yet constructed to their full lengths.

requested waiver of § 7-302.1.B of the Fauquier County Zoning Ordinance, which requires approval by the Board of Supervisors.

**DISCUSSION:** The Applicant purchased the Property in June and July of 1997. On December 4, 1998, she placed an easement on the entire Property in favor of the Virginia Outdoors Foundation (VOF).

**The VOF Easement.** The VOF Easement is very restrictive, and is intended to assure the retention of the land in its current character, even though it provides for limited use of the farm. That easement contains the following stringent restrictions, among others:

3. Subdivision of the Property into more than nine (9) parcels is prohibited....
4. In order to preserve the forested character of the property and its natural and scenic resource values, a minimum of two thirds of the area of any parcel shall remain in forest. . . . Clearing of the forest shall be permitted for the purpose of creating sites for permitted buildings and constructing private roads. . . provided that the open acre acreage of any parcel shall not exceed one third of the total parcel. . . .
5. Grading, blasting or earth removal shall not materially alter the topography of the Property except for dam construction to create private conservation ponds, or as required in construction of permitted buildings and connecting private roads described in paragraph 6, below . . . .
6. No permanent or temporary building or structure shall be built or maintained on any parcel on the Property other than (i) one (1) single family dwelling and one (1) secondary dwelling. . . . Any building or structure, dwellings included, shall be constructed, sited, designed and landscaped to harmonize or be complementary with the existing landscape, shall not diminish the scenic views enjoyed by the public, and shall minimize impact on the natural, scenic, and open space qualities of the Property.”

In keeping with the character of the restrictions established by the VOF, the Applicant wishes to subdivide the Property for estate planning purposes, and to respect the natural beauty of the land, including the topography, vegetation and water courses.

In order to minimize the physical and visual impact of development on the Property, the Applicant also proposes to use Type III private roads, rather than the Type I or II roads that would otherwise be required. It is entirely unlikely, and unnecessary, that a Type I road would ever be constructed. The County does not require that these roads be constructed, only designed.

**Applicable Ordinance Requirements.** Prior to March 8, 2007, construction of such private roads requires the waiver of the following regulations:

Type I, II, and III private streets are permitted in the RC zone when employed for large lot subdivisions as is proposed in this case.

§ 7-302.1.B of the Fauquier County Zoning Ordinance requires that

1. (B) The private street must connect directly to a state maintained road.

(C)The right-of-way must be a minimum of fifty (50) feet wide.

§ 2-39.C.3 of the Fauquier County Subdivision Ordinance requires for large lot subdivisions that such subdivision is permitted for

C) The division of a lot, tract or parcel of land into two or more parcels all of which are fifty (50) acres or greater for the purpose of transfer of ownership or building development provided:

\* \* \*

(2) all lots are served by a right-of-way at least thirty (30) feet in width;

\* \* \*

(3) the design standards of Article 7-303.1 of the Zoning Ordinance are met, except that the right-of-way width may be reduced as provided above [30 feet];

Section 7-303.1 effectively mandates a Type I or II private street in connection with the subdivision of the Property.

On March 8<sup>th</sup>, as noted, the Board amended these provisions to permit consideration of additional factors with respect to waiver of the requirement that new subdivision roads connect directly to public streets, with the following changes:

### **7-302 Limitations**

1. The following limitations shall apply:

**A. All types:**

- (1) Private streets within a development shall be limited to those streets which are not required or designed to provide access to adjacent properties or the remainder of the tract being developed, or other streets, as determined by the Commission.
- (2) The private street must connect directly to a state maintained street. In reviewing applications for a waiver of this limitation, the Board may consider as an additional

factor in granting such waiver the development limitations which are imposed on the subject property because the proposed division is either (1) a family transfer pursuant to §2-39 of the Fauquier County Subdivision Ordinance, or (2) a large lot subdivision pursuant to §2-310 of this Ordinance provided that the parent property is subject to a conservation easement held by a body politic or a political subdivision of the State.

(3) The right-of-way must be a minimum of fifty (50) feet in width.

(4) Streets traversing lots - No private street shall be approved which traverses a lot except along the boundaries of such lot or except where the portions of the lot on either side of the new street satisfy the minimum requirements of this Ordinance for the creation of lots.

B. Type II - No private street(s) shall serve more than seven (7) lots.

C. Type III - Cannot be zoned Commercial or Industrial.

2. The Board may modify the foregoing limitations in conjunction with a request for a special exception permit, site plan approval or subdivision plan approval provided the applicant can show that no other remedy is realistically feasible, that plausible alternatives have been exhausted, that to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property and that properties through which access is planned will not be unreasonably affected.

The Applicant proposes to design extensions of Orchard Hill Lane and Apple Manor Road as private Type III roads in a fifty (50) foot right-of-way, with a gravel typical section that will consist of a minimum of six inches of compacted aggregate base, Type I No. 21A, with a wearing surface of a VDOT Class A prime and double seal coating. The travel way will be twenty (20) feet wide, sufficient for a Type III road, for which there are no standards except those as may be approved in connection with the subdivision of the Property. The existing roads serving the proposed lots would remain as they exist today.

**Justification for the Waivers Requested.** The reasons for requesting the waivers required for the division of the Property are straightforward.

1. There are two such waivers requested. *The first request*, for action by the Board, is a request that the County waive the requirement that the short access roads required for these lots must connect to a public road. Pursuant to the newly amended provisions of § 7-302, there are several matters that may be evaluated in connecting with such a request.

First, the proposed lots are already connected by private roads of no known standard to State Route 688, through the Apple Manor Subdivision. The land cannot, according to the County, be divided at all if this waiver is not granted, for there is no public street to which these lots and

their access roads can connect in fact, and the Applicant doubts the ability of a locality to preclude subdivision completely under these circumstances.

With respect to the Ordinance provisions, because of the lay of the land and its surrounding properties the access roads to these lots will not provide access to other lands that have not yet been developed. Once these roads are approved, no others accessing Apple Manor Road can be planned or constructed. The roads will be designed to preclude any such connection, even were one possible.

Additionally, as the Board knows, the Property is subject to a VOF easement that explicitly limits the clearing of the land to no more than one-third. No more than eight lots may be created from it, thus assuring that the approval of the waiver will authorize no greater development of the land. Further, the destruction of the landscape needed to construct a higher standard road is completely inconsistent with the intention of that easement. The environmental impact caused by the ultimate construction of higher standard roads, serving very few homes, would be much greater than any issues that can arise with the construction of the road system that the applicant proposes. The Board has now explicitly determined that the existence of such an easement is an “additional factor” that the Board may consider in connection with the grant of a waiver.

Surrounding properties through which access is planned will not be unreasonably affected. Because reasonableness is sometimes in the eye of the beholder, Virginia law clothes the Board with substantial discretion in assessing whether such waivers should be granted, and its judgment will not lightly be overturned. *Cf. Board of Supervisors v. Robertson*, 266 Va. 525, 587 S.E.2d 570 (2003) (“deviations” from requirements of a zoning ordinance are legislative in nature and subject to the “fairly debatable” rule. It is the Applicant’s position that any additional traffic will be minimal. The total trip generation in the event that all eight lots are developed would be only 80 vehicle trips per day, pursuant to standards published by the Institute of Transportation Engineers, and employed by Fauquier County. Providing for two points of access, from Apple Manor Road and from Orchard Lane, will send the traffic in two separate directions from the new lots, to reach the existing Apple Manor/Route 688 intersection, and will cause such additional traffic as will occur to reduce the impact on either Apple Manor or Audubon Trail. It will also prove safer to have access from two directions, as this proposal would permit, in the event that one is close for weather or other reasons.

2. *The second request* is for a waiver of the requirement for a Type I or II road. While this is conceptually distinct from the requirement for connection to a public road, and is administratively processed, the reasons for it are applicable to the analysis of the first of these waivers.

The construction of a Type I or II road would require very significant clearing and grading of the property to satisfy applicable design criteria. There is simply no justification for private streets to be designed to a significantly higher standard than any of the roads surrounding and accessing the property, and which service a much large number of vehicles per day than would ever be produced from the division of the Property. The construction of such roads would cause

significant environmental harm. There are places where the topography of the land makes it essentially impossible to design or construct a road that is 10% grade or less, without significant costly earthwork that would be wholly unnecessary for the limited amount of traffic that would be generated, and the environmental damage that would ensue. Further site visits with the staff demonstrate that there is no other remedy realistically feasible for the Applicant, and all plausible alternatives have been examined in detail, and exhausted.

These roads would only service the proposed lots, and would not provide access to undeveloped lands or to other public or private streets. The extension of Orchard Hill Lane will service only three lots. Because the Applicant has no plans for the use development of the land, no road of any kind will be constructed in the foreseeable future. Any road that is constructed will have to meet the requirements for erosion and sedimentation control.